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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92

CONSOLIDATED OPPOSITION OF HYPERCUBE TELECOM, LLC TO PETITIONS FOR RECONSIDERATION AND/OR CLARIFICATION

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EXECUTIVE SUMMARY

HyperCube Telecom, LLC, an intermediate provider of wholesale local and national tandem switching and transport services, submits its Opposition to certain aspects of the petitions for reconsideration and/or clarification filed by MetroPCS Communications, Inc., NECA, USTelecom, and Sprint Nextel Corporation addressing the ICC section of the *USF/ICC Transformation Order*. HyperCube is a carrier with a national footprint, and it does not engage in end-user traffic stimulation, although the Company does employ revenue-sharing as a marketing technique. HyperCube's overall traffic profile does not fall within the definition of "access stimulation," but its interstate access tariff is nonetheless benchmarked to the rate of the price-cap ILEC with the lowest interstate access charges in each state.

The *Order* reflects a reasoned balancing of competing interests to resolve complex issues. To the extent challenged in this Opposition, these Petitions should be dismissed for failure to satisfy the standard for grants of reconsideration and clarification. For the most part, they merely repeat arguments the Commission has already rejected, or, under the guise of seeking "clarification," seek rule modifications the Commission has rejected.

In particular, the Commission has already considered and rejected claims for restrictions on CLEC access charge rates that would limit such rates to a summation of rate elements duplicating those of the benchmarked LEC, adopting instead benchmarking based on "equivalent functionality." The Commission also has considered and rejected a cap on CLEC local transport miles that would be the lower of the benchmarked LEC's average miles or the actual miles, an approach that would deprive CLECs of the marginal benefits of investments in innovative and efficient network design and technologies. Similarly, the Commission considered and rejected calls for a flash-cut to an ICC access charge rate of $0.0007, which would be below-cost and

confiscatory. The Commission adequately explained and articulated its authority for permitting VoIP providers to collect originating access charges. The Commission also adopted a rule that reasonably describes the covered IP traffic and facilitates dispute resolution on a going-forward basis, preferably through good faith intercarrier agreements. The Petitions offer no previously unavailable information and demonstrate no material errors in the *Order* warranting reconsideration or clarification of the Commission's decision.

Similarly, the Commission should reject efforts to impose additional restrictions on the filing of CLEC access charge tariffs. It has already found imposition of a lower benchmark appropriate in situations implicating "access stimulation," and there is no basis for denying such tariffs "deemed lawful" status or requiring them to be filed on less than 16 days' notice. The Commission has already heard and rejected these arguments as well, and the Petitions offer nothing new.

The Commission should not modify the rules addressing "access stimulation" to make them route-, carrier-, or traffic-type specific. The rules already cover situations outside the targeted end-user traffic stimulation situation that was the focus of the Commission's attention, and further broadening the rules serves no purpose. Such a modification could, however, allow some carriers to game the system, and it would expand rather than minimize the number of ICC disputes brought before the Commission.

There is also no need to establish uniquely onerous procedures for resolution of such proceedings. Where ICC rates are already at or below the lower benchmark applicable to "access stimulation" situations, there should be no grounds for a complaint asserting no more than satisfaction of the threshold in traffic exchanges with a given carrier. The "clear and convincing evidence" standard is reserved for situations implicating important human rights, and

it is inappropriate for an FCC access charge complaint. Instead, the Commission should establish simple, expedited procedures that allow a challenged carrier to provide confidential rebuttal evidence that its overall traffic does not fall within the "access stimulation" definition, resulting in prompt dismissal of the complaint. The Commission also should find that questions about the relationship between a service provider and its end-user customers have no bearing on the obligation of an IXC to pay interstate access charges to an intermediate provider, whose role is to switch traffic to the network of the service provider, and who has no control over the relationship between the provider and its end-user customers.

The Commission should reject calls to impose liability on intermediate providers for errors in the call signaling information that the Commission's new rules require the carriers to pass downstream unaltered. Not only does the intermediate carrier have to rely on the originating carrier for the data, but also such liability would deter intermediate carriers from making reasonable efforts to supplement the information they receive, as provided in industry standards. Imposition of liability on intermediate carriers could only worsen, not improve, the phantom traffic problem.

To address phantom traffic effectively, the Commission must instead make originating carriers responsible for compliance with the call signaling rules. It should not delay these rules or adopt a blanket exception that allows carriers to avoid compliance with generalized claims of "infeasibility" or "impracticality," which may be based only on the adverse financial impact of re-computation of traffic ratios based on accurate information. There are marketplace solutions now that limit the situations of true technical infeasibility. The Commission should therefore grant individual waivers only on the basis of specific information identifying the particular switch locations and notifying the industry of the parameters of the problem situations. Provided

that carriers are responsible for updating the LERG following LNP, HyperCube can support NECA's default approach in cases of true technical infeasibility. HyperCube also recommends that, if factoring is permitted, carriers using it be required to augment the factoring with audits and additional signaling.

Because the Petitions do not satisfy the high standards for reconsideration and/or clarification, the Commission should not adopt the repetitive proposals challenged here. The Commission should, however, adopt the clarifications presented by HyperCube if the Commission considers the issues.

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CONSOLIDATED OPPOSITION OF HYPERCUBE TELECOM, LLC TO PETITIONS FOR RECONSIDERATION AND/OR CLARIFICATION

HyperCube Telecom, LLC ("HyperCube" or the "Company") submits its Consolidated Opposition ("Opposition")[1] to points raised in certain petitions for reconsideration and/or clarification of the *USF/ICC Transformation Order*[2] issued by the Federal Communications Commission (the "Commission" or "FCC"). In particular, this Opposition opposes certain

[1] This Opposition is timely filed pursuant to the Public Notice published in the *Federal Register*. *See* 77 Fed. Reg. 3635 (Jan. 25, 2012); *see also Comment Cycle Established for Oppositions and Replies to Petitions for Reconsideration of the USF/ICC Transformation Order*, Public Notice, DA 12-30 (Feb. 3, 2012).

[2] *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (Nov. 18, 2011) (the "*Order*" or the "*USF/ICC Transformation Order*"). The Commission and its Wireless Competition Bureau subsequently issued (1) *sua sponte*, an *Order on Reconsideration*, FCC 11-189 (Dec. 23, 2011) ("*Reconsideration Order*"), which, *inter alia*, delayed the bill-and-keep transition for intraMTA CMRS/LEC traffic exchanged pursuant to existing contracts; and (2) an *Order*, DA 12-147, (Feb. 3, 2012) ("*Clarification Order*"), which, *inter alia*, clarified that there are a variety of ways in which carriers may calculate the percentage of traffic governed by the "VoIP-PSTN" framework. *Id.* at ¶ 23. Appeals of the *USF/ICC Transformation Order* are pending. *See Direct Commc'n Cedar Valley v. Fed. Commc'n. Comm'n*, No. 11-9581 (10th Cir. filed Dec. 8, 2011).

requests for reconsideration and/or clarification directed at aspects of the Intercarrier Compensation ("ICC") portions of the *Order*.[3]

I. Introduction – HyperCube Telecom, LLC

HyperCube, headquartered near Dallas, Texas,[4] is a premier provider of wholesale local and national tandem switching and transport services using a tandem infrastructure that supports both Time-Division Multiplexing ("TDM") and Internet Protocol ("IP") interconnection. HyperCube's customers span the spectrum of traditional and next-generation carriers and application service providers, including commercial mobile radio service ("CMRS") carriers, wireline competitive local exchange carriers ("CLECs"), cable telephony providers, and Voice over Internet Protocol ("VoIP") providers. The Company offers competitive transport of switched access traffic, as well as local traffic, from the technologically diverse networks of HyperCube customers to those of wireless carriers, interexchange carriers ("IXCs"), CLECs, and traditional incumbent local exchange carriers ("ILECs"). HyperCube performs switching, transport, signaling, and database queries, among other services. The Company operates a nationwide optical-backbone network (both TDM- and IP-based) with a switching infrastructure located in major markets that provides network diversity via direct switching to end offices.

[3] The Petitions for Reconsideration and/or Clarification of the *Order* addressed in this Opposition include: Petition of MetroPCS Communications, Inc. for Clarification and Limited Reconsideration (filed Dec. 29, 2011) ("MetroPCS Petition"); Petition for Reconsideration and Clarification of the National Exchange Carrier Association, Inc., Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance (filed Dec. 29, 2011) ("NECA Petition"); Petition for Reconsideration and Clarification of Sprint Nextel Corporation (filed Dec. 29, 2011) ("Sprint Petition"); Petition for Reconsideration of the United States Telecom Association (filed Dec. 29, 2011) ("USTelecom Petition"); Petition for Clarification or, in the Alternative, for Reconsideration of Verizon (filed Dec. 29, 2011) ("Verizon Petition") (collectively, "Petitions," and each individually, a "Petition").

[4] HyperCube recently announced a definitive agreement to be acquired by West Corporation, a leading provider of technology-driven voice and data solutions headquartered in Omaha, Nebraska. *See International Authorizations Granted*, Public Notice, Report No. TEL-01538, DA 12-43 (Jan. 12, 2012) (reporting Jan. 6, 2012, grant of File No. ITC-T/C-20111201-00363).

HyperCube transports traffic to its switch locations and rates calls based on the location of those major market switches. One of HyperCube's marketing tools is revenue sharing with wholesale customers, but HyperCube is a carrier with a national footprint, and its national traffic volumes and growth profile do not meet the defining thresholds for "access stimulation" under new Section 61.3(aaa) of the Commission's Rules as adopted by the *Order*.[5]

Nonetheless, HyperCube's interstate access rates are already at levels benchmarked to the lowest price cap LEC rates in each state. Moreover, HyperCube has a strong preference for exchanging traffic pursuant to bilateral intercarrier agreements, rather than tariffs, where traffic volumes warrant direct connections, and the vast majority of HyperCube's traffic is exchanged pursuant to such agreements.

II. The Petitions Should Be Dismissed for Failure to Satisfy the Standards for Granting Reconsideration or Clarification.

A. The USF/ICC Transformation Order Reflects a Balancing of Competing Interests.

HyperCube commends the Commission for truly beginning to reform the ICC system, a goal that has long eluded prior Commissions. Like almost every other commenting party, HyperCube would prefer that the Commission had adopted all HyperCube's recommendations and had made different decisions in some areas. HyperCube recognizes, however, that the Commission had an enormous task in balancing the competing interests and needs of numerous public and private entities, in order to reform an intercarrier compensation system the Commission believed no longer served the public interest and was antithetical to achievement of the Commission's planned transition to a universal broadband infrastructure. The FCC's goal

[5] *See Order*, Appendix A at 562 (§ 61.3(aaa)(1)(ii)). In HyperCube's case, there may be some routes where traffic exchanges with a particular carrier may meet one of the threshold tests if the route was considered outside the context of HyperCube's total traffic, because, for example, HyperCube acquired a new customer or its wholesale customer serves more end-users than the carrier with which traffic is exchanged, but HyperCube's traffic does not satisfy these tests on an overall basis. HyperCube does not participate in end-user traffic stimulation that would artificially inflate end-user calling.

could not have been perfection but rather a reasonable accommodation of many different interests in a reformed ICC system intended to advance the IP transition without depriving carriers of sufficient funding to continue to offer services to the public.[6]

With respect to the reconsideration/clarification issues addressed in this Opposition, the Commission already has achieved a reasonable balance that should not be upset on reconsideration,[7] however insistently special interests may repetitively press their claims to be kept whole, or even to gain new advantages in the marketplace.

B. The Standard for Grant of Reconsideration and Clarification Is Not Met.

With respect to the issues discussed in this Opposition, the Petitions in large part merely seek a second hearing for the same arguments the Commission previously found wanting or, under the guise of seeking clarification, urge revisions to the new rules based on previously-rejected arguments. Reconsideration is not granted, however, just because a party did not achieve every result it wanted, disputes the FCC's public interest determination and balancing of competing interests, or seeks to obtain a competitive advantage. Under well-established Commission precedent, reconsideration is granted only when the public interest requires it, as when there has been a material error or omission in the prior decision.[8]

Under well-established standards, a petition for reconsideration may be granted only if it relies on facts or arguments not previously presented to the FCC.[9] Even if the facts or arguments have not been and could not have been presented previously, a petition for reconsideration may

[6] *See, e.g., Connect America Fund*, Notice of Proposed Rulemaking, 26 FCC Rcd. 4554, ¶¶ 658, 701 (2011).

[7] *See, e.g., Order* at ¶949 n.1921.

[8] 47 C.F.R. § 1.429(l)(1).

[9] 47 C.F.R. § 1.429(b).

be granted in only limited circumstances.[10] Commission policy is that "petitions for reconsideration are not to be used for mere re-argument of points previously advanced and rejected,"[11] and the FCC will refuse to consider arguments it has previously addressed.[12]

The Commission also has made clear that it will not grant "clarification" of a rule change when the rule is not ambiguous.[13] This is particularly appropriate where, as here, a Petition may denominate as "clarifications" what are in fact requests for substantive rule changes that do not satisfy the standards for a grant of reconsideration.

For these reasons, the public interest lies with the prompt dismissal of the Petitions, to the extent challenged here, to minimize market uncertainty and to allow the industry and the public to adjust to the new ICC regime.

III. The Commission Should Deny Petitions for Reconsideration/Clarification That Seek to Modify the Rules for Competitive Advantage.

In the *Order*, the Commission established a ceiling on interstate access charges that the Commission found to be a reasonable and sufficient remedy for addressing end-user traffic stimulation, termed "access stimulation" under the new rules.[14] The focus of the Commission's

[10] A petition for reconsideration relying on facts not previously presented will be granted only when: (1) the facts relate to events that occurred or circumstances that changed since the last opportunity to present them to the Commission; (2) the facts were unknown to the petitioner until after its last opportunity to present them to the Commission, and the petitioner could not have learned of the facts through the exercise of ordinary diligence; or (3) the Commission determines that consideration of the facts relied on is required in the public interest. 47 C.F.R. § 1.429(b).

[11] *See S&L Teen Hosp. Shuttle*, Order on Reconsideration, 17 FCC Rcd. 7899, ¶3 (2002).

[12] *See, e.g., Structure and Practices of the Video Relay Service Program*, Memorandum Opinion and Order, 26 FCC Rcd. 14895, ¶24 (2011) (denying AT&T petition where the Commission had already "considered and rejected the same arguments repeated by AT&T in its petition").

[13] *See, e.g., Jurisdiction Separations and Referral to the Federal-State Joint Board Nat'l Telecomm. Coop. Assoc.*, Order, 26 FCC Rcd. 9498, ¶7 (2011) (request for clarification denied where rules adopted by Commission were clear and party seeking clarification failed to show why clarification was necessary).

[14] *See Order*, Appendix A at 562 (§ 61.3(aaa)(1)(ii)).

attention was arrangements involving LECs with high access rates,[15] not revenue sharing in general.[16] The Commission has already found imposition of a lower tariff benchmark to be the appropriate remedy to deter end-user traffic stimulation. Interstate access rates at or below that ceiling should therefore be deemed reasonable for all other traffic exchanges.

Nonetheless, some carriers continue to repeat their calls for additional rate restrictions that may give those carriers a competitive advantage.[17] Not only do these petitions fail to satisfy the standards for reconsideration or clarification, but also their grant would be contrary to the public interest during the transition to a universal broadband infrastructure that promotes the IP transition while ensuring ubiquitous call completion.

A. Equivalent Functionality, Not Duplication of Rate Elements, Should Remain the Basis for Computing a Benchmarked Rate.

Sprint yet again urges the Commission to limit access charges of competitive carriers to a summation of rate elements duplicating the rate elements tariffed by legacy carriers. The motivation for seeking this "clarification" is, of course, to reduce the access rate paid to CLECs to a rate below that of the benchmarked ILEC. This would, however, leave a competitive carrier with less compensation for providing the same access functionality. Sprint has neither presented new evidence nor demonstrated a material error or omission in the *Order*, and Sprint's repetitive arguments should be dismissed on this basis alone.

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[15] *Order* at ¶¶ 656-57, 670.

[16] *Id.* at ¶672.

[17] *See*, *e.g.*, Sprint Petition at 6 (seeking limitation of LEC rate elements that may be included in a CLEC's composite access charge rate); *see also* MetroPCS Petition at 16 (seeking reconsideration of the rules to extend the special rules applicable to situations involving "access stimulation" to intrastate services). For non-CMRS traffic, this matter is not only subject to state jurisdiction**,** it also is an issue which MetroPCS is asking the Commission to "anticipate and stop" regardless of whether it had been "a focus of prior concern," MetroPCS Petition at 18–19, and about which MetroPCS merely speculates that "states with multiple MTAs no doubt will experience an immediate explosion of traffic pumping. . . ."). *Id.* at 6, n.20. The Commission, however, already found the ongoing reform of the ICC system a sufficient deterrent to access stimulation situations not addressed in the *Order*. *Order* at ¶690.

The Commission rejected this "duplicated function summation" approach in the *Order*,[18] for what matters is whether the tariffed access functionality is being provided to, for example, the IXC, and whether the rate charged for that functionality is no higher than the applicable LEC benchmark rate.[19] Sprint is buying access services, and so long as it receives those services, it should be agnostic as to the way they are provided or how they are named. It is not entitled to pick and choose the rate elements it will pay for – it is for the provider to determine the way access is provided. Sprint is not entitled to free services or service components simply because it exchanges traffic with a carrier that has devised an efficient and effective way of providing those services that is better than that provided by a legacy network.

Implicit in the *Orde*r's rejection of this approach is the recognition that such alternative arrangements are to be encouraged, not penalized. One way in which a competitive carrier can succeed in the marketplace is to leverage innovations in network design and operation to deliver services more efficiently than the carrier's competitors.[20] Such network design and operational innovations are critical to the transition to a ubiquitous broadband infrastructure, while ensuring that all calls continue to be completed, regardless of whether they use traditional TDM- or IP-based protocols.

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[18] *Order* at ¶970 ("Competitive LECs should be entitled to charge the same intercarrier compensation as incumbent LECs do under comparable circumstances."); *id.* at ¶970 n.2020*; see also Order*, Appendix A at 506-07 (§§ 51.903(c), (d), (i)) (stating that CLECs may provide services that are "functionally equivalent" to ILEC services).

[19] *Order* at ¶970 n. 2020. This is consistent with prior FCC policy statements. *See, e.g.*, *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, ¶55 (2001) (CLEC composite rate to benchmarked to ILEC rate, regardless of rate structures or nomenclature); *Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108, ¶21 (2004) (intermediate carriers to benchmark to ILEC tandem switching rate).

[20] This is particularly important because a competitive carrier gets revenues only from its customers, including its access customers, and it receives no guaranteed support or revenue replacement under the *Order*. *Order* at ¶864.

To adopt Sprint's approach would be to foreclose competition based on network investment and improvement, the epitome of a competitive telecommunications marketplace. Moreover, where there are sufficient traffic volumes at issue to warrant direct connections between carriers, they have the option of negotiating bilateral commercial agreements that will make the tariffed ICC rates irrelevant. Such arrangements accelerate the transition from the old ICC regime to one that makes economic sense for both parties.

B. Repetitious Efforts to Impose Further Restrictions on Access Charges Should Summarily Be Dismissed.

The Commission should similarly reject other repetitious demands for CLEC access pricing that replicates, or even is lower than, that of the LEC.[21]

1. A Cap on Local Transport Miles Is Not Needed.

For example, Sprint and USTelecom urge the Commission to "clarify" the transport mileage tariffing rules. They would have the Commission cap transport mileage calculations at the lesser of the benchmarked price cap LEC's average local transport miles (however that might be determined) or the actual local transport miles.[22] In the guise of seeking clarification, these parties in fact are asking the Commission to adopt rules the Commission considered and has already rejected.[23]

To the extent there are call routing situations that are demonstrably the result of efforts to artificially inflate transport mileage calculations, the complaint remedy is available, but the

[21] *See, e.g.*, USTelecom Petition at 35.

[22] Sprint Petition at 7; USTelecom Petition at 35. In support, Sprint and USTelecom merely assert that there are situations in which LECs re-routed traffic to maximize the per-mile local transport fee, rather than for network or engineering reasons. Their proposed "clarification," however, would not be limited to such situations.

[23] Sprint raised the local transport rate issue at least as early as last summer. *See* Comments of Sprint Nextel Corp. at 15, WC Dkts. 10-90, *et al.*, (filed Aug. 24, 2011) ("First, due to the fact that they are set at extremely high levels, LEC transport access rate elements are a major cause of traffic pumping and mileage pumping schemes.").

possible existence of such situations is not a reason to impose an arbitrary cap on all CLEC rates in order to give a windfall to certain IXCs. The Commission already found the benchmarked mileage rates to be reasonable, and during the transition, CLECs that have designed their networks for efficiencies should be entitled to the marginal benefits of their investments. Adoption of the Sprint/USTelecom approach would only deter the very investment in advanced network architectures that should be a hallmark of the broadband transition, and the requested "clarification" should not be granted.

2. The Rejection of a Flash-Cut to a $0.0007 Per Minute Rate Was Proper.

Various carriers, including Sprint and USTelecom members, also again press the Commission to immediately flash-cut to a per minute interstate access rate of $0.0007.[24] They offer no new information or compelling evidence of error in the *Order*. They merely repeat arguments the Commission previously rejected.[25] As numerous participants have stated in the record, such a rate is not compensatory.[26] The Commission reasonably found that a glide path

[24] USTelecom Petition at 36 (citing Sprint and AT&T filings in the existing record); Sprint Petition at 8, n.13 (citing only Sprint's previously-filed comments); *cf.* Comments of Sprint Nextel Corporation, at 8, 12-19, WC Dkts. 10-90, *et al.*, (filed Apr. 1, 2011).

[25] *See, e.g.*, USTelecom Petition at 36 (relying on filings by Sprint and AT&T made before issuance of the *Order* and justifying imposing below-ILEC pricing in cases where there is "access stimulation" on the basis that CLECs engaged in access stimulation have low costs, because "the equipment they use is almost always located in a carrier's rural central office.").

[26] *See, e.g.*, Comments of Consolidated Communications Holdings at 22, WC Dkts. 10-90, *et al.*, (filed Apr. 1, 2011) ("similarly, any proposal that would immediately set the rate for intercarrier compensation at or close to zero, such as $0.0007 . . . should be rejected."); Comments of Core Communications at 13-14, WC Dkts. 10-90, *et al.*, (filed Apr. 1, 2011) ("Requiring use of a lower rate, such as $0 or $0.0007 is to require carriers to terminate traffic at a below-cost rate. The primary effect of such a measure would be to provide the originating carriers a regulatory windfall, strip terminating carriers of a lawful and important revenue stream, and result in regulatory takings."); Comments of Free Conferencing at 34, WC Dkts. 10-90, *et al.*, (filed Apr. 1, 2011) ("Imposing rates that are lower than BOC rates would be unreasonable."); Comments of PAETEC, MPower, *et al.*, at 38, WC Dkts. 10-90, *et al.*, (filed Apr. 1, 2011) ("The $0.0007 rate is an arbitrary figure that was never based on any cost analysis; in reality, it does not permit carriers to recover their costs unless . . . they are extremely large with long distance, wireless, and other affiliates that will receive a windfall from the reduced rates."); Comments of Missouri Small Telephone Company Group at 8, WC Dkts. 10-90, *et al.*, (filed Apr. 18, 2011) ("The artificially

transition, rather than a flash-cut imposition of an arbitrary low rate, is the appropriate course to ensure that carriers continue to offer the services on which the public relies while the carriers adjust to new marketplace realities.[27]

3. The FCC Supported Its Decision to Permit VoIP Collection of Originating Access Charges.

Similarly, the Commission has already heard and rejected USTelecom's arguments against allowing any interstate access charges for VoIP traffic. Now USTelecom urges particular reconsideration of the decision to allow VoIP providers to collect originating access charges.[28]

USTelecom offers no new evidence or arguments that demonstrate material error in the *Order*. The USTelecom Petition questions the sufficiency of the explanation of the Commission's reasoning, but the Commission devoted multiple pages to its articulation of its policy rationale.[29] Similarly, while USTelecom questions the Commission's purported reliance on Section 251(b)(5) for authority to apply originating access charges to VoIP-PSTN traffic, USTelecom ignores the Commission's reliance on Section 251(g) "to adopt transitional

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designed $0.0007 rate would not cover the [companies'] costs of billing for the traffic, much less any reasonable costs for the use of their networks."); Comments of NECA, NTCA, OPASTCO, and WTA at 22, WC Dkts. 10-90, *et al.*, (filed Apr. 18, 2011) ("Likewise, the Rural Associations also strongly oppose the mandatory use of near-zero rates, such as $0.0007 . . . for many carriers the costs of merely billing and collecting a $0.0007 or similar rate are higher than the rate itself . . . ."); Comments of SureWest Communications at 23, WC Dkts. 10-90, *et al.*, (filed Apr. 18, 2011) ("ICC rates must be rationally based on data and models . . . some parties have called for an ICC rate level of $0.0007 cents per minute, although that rate is a scarcely-justified figure that has never been identified as the rate actually needed for RoR carriers (or others) to recover their costs."). *See also Reconsideration Order* at ¶6 ("Moreover, the Commission believed that, as a general matter, LEC-CMRS agreements contained rates at $0.0007 or less as their reciprocal compensation rate. Parties indicate, however, that many existing LEC-CMRS agreements reflect reciprocal compensation rates 'much higher than $0.0007'").

[27] *Order* at ¶35.

[28] USTelecom Petition at 39. Neither the USTelecom Petition, nor this Opposition, address the issue of the appropriate access charge rate for such traffic.

[29] *Order* at ¶¶ 934-939. *See also Order* at ¶40 ("Under this framework, all carriers originating and terminating VoIP calls will be on an equal footing in their ability to obtain compensation for this traffic.").

intercarrier compensation rules, preserving the access charge regimes that predated the 1996 Act 'until [they] are explicitly superseded by regulations *prescribed by the Commission*.'"[30]

Allowing VoIP providers the right to collect originating access charges promotes the IP transition and maintains a level playing field during the transitional phase of ICC reform. The USTelecom approach, on the other hand, would disadvantage new entrants and new technologies.[31] The result of such an approach would be a less competitive market, which would be contrary to the public interest. Reconsideration of this issue is not appropriate.

4. There Is No Need for a CPE Definition.

With respect to PSTN-VoIP traffic, USTelecom also urges a rule "clarification" intended to add a new definition of "Internet protocol-compatible customer premises equipment,"[32] or of VoIP traffic, apparently because some USTelecom members are engaged in intrastate access charge litigation that may focus on whether certain traffic is IP traffic.[33] However, the Commission's purpose in the *Order* was to "make clear the prospective payment obligations for VoIP traffic exchanged in TDM,"[34] and the FCC did not intend "to resolve the numerous existing industry disputes, of which it was well-aware."[35]

If it is clear, as USTelecom apparently contends, that all "cable VoIP traffic" is within the IP-PSTN category regardless of traffic distribution methodology, then there is no need for

[30] *Order* at ¶956 (emphasis in original); *id.* at ¶954 (Section 251(b)(5) applicable to Section 251(g) traffic only to the extent the FCC makes it so applicable); *see generally*, *id.* at ¶¶ 954-959.

[31] USTelecom also seeks a rule "clarification" that would disadvantage new market entrants by requiring them to set their intrastate tariffs at interstate levels prior to the dates applicable to existing carriers in the market. USTelecom Petition at 37. Ensuring that potential new market entrants are deprived of earning opportunities enjoyed by their established competitors is hardly a way to promote a competitive market.

[32] USTelecom Petition at 34-35 (seeking "clarification" of terminology used in new Rule 51.913).

[33] *Id.* at n.54.

[34] *Order* at ¶¶ 40, 945.

[35] *Order* at ¶935.

clarification. If the matter is in dispute, then it is a larger issue not appropriate for a staff clarification. Such disputes may best be resolved in the context of the intercarrier negotiations for which the Commission has expressed a clear preference.[36] Further, this issue is one that exists during the transition only. Thus, there is no need to revise the current rule in order to achieve the objective of minimizing future disputes, and, indeed, such a "clarification" may inhibit the intercarrier negotiations favored by the Commission.

C. The Commission Should Once Again Reject Efforts to Impose Additional Restrictions on Benchmark Tariffs.

Without offering any new evidence or support, Sprint also continues to urge the Commission to impose more onerous tariff-filing requirements on carriers in situations where the access stimulation triggers are satisfied, despite the Commission's prior express rejection of these proposals.[37] For example, Sprint again presses its crusade for the Commission to deny "deemed lawful"[38] status even to tariffs with rates at or below the benchmarked rate, requiring them to be filed on less than 16 days' notice.[39] Yet the Commission already determined such rates to be reasonable and specifically established the rate limitation as the remedy for any access stimulation problem.[40] Sprint may have a list of items it asked for but did not get in the *Order*,

[36] *Order* at ¶947 ("Our framework also seeks to facilitate discussions among the providers exchanging VOIP-PSTN traffic, lessening the need for prescriptive Commission regulations.") *See also Order* at ¶¶ 964, 965.

[37] *See Order* at ¶¶ 696-697.

[38] *See* 47 U.S.C. § 204(a)(3).

[39] Sprint Petition at 9.

[40] *Order* at ¶33 ("We adopt rules to address the practice of access stimulation, in which carriers artificially inflate their traffic volumes to increase ICC payments. Our revised interstate access rules generally require competitive carriers and rate-of-return incumbent local exchange carriers (LECs) to refile their access tariffs at lower rates if the following two conditions are met . . ."); *id.* at ¶696 ("We conclude that the policy objectives of this proceeding can be achieved without creating an exception to the statutory tariffing timelines.").

but Sprint has provided no more grounds for reconsideration of this item than for reconsideration of any others on its list.

IV. The Commission Should Deny Petitions for Reconsideration That Seek to Re-Define the "Access Stimulation" Criteria or Seek to Involve the Commission in Micromanagement of Intercarrier Compensation Through Numerous and Inefficient Complaint Proceedings.

In the *Order*, the Commission addressed a narrow issue of end-user traffic stimulation by crafting a limited, virtually self-effectuating remedy that imposes a ceiling on interstate access charges and other tariff restrictions when a LEC's service meets the threshold tests defining "access stimulation."[41] Even for carriers that do engage in end-user traffic stimulation, which HyperCube does not, the benchmark level represents the Commission's reasoned determination of a reasonable rate during the transition. The rules already cover situations other than the end-user traffic stimulation they were intended to address. Reconsideration should not be used to broaden the rules further so as to involve the Commission in micromanagement of every intercarrier compensation dispute.

In addressing end-user traffic stimulation, the Commission was not concerned with limiting revenue-sharing generally,[42] and it was seeking to minimize, not increase, the number of access charge disputes the FCC would have to address. The goal was efficiency; Commission review of every traffic exchange, however it might arise, including traffic exchanges having nothing to do with end-user traffic stimulation, plainly would thwart that goal. As the

[41] *See Order*, Appendix A at 562 (§ 61.3(aaa)(1)(ii)) (limiting "access stimulation" to situations where a revenue-sharing LEC "[h]as either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month, or has had more than a 100 percent growth in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year."). These tests are national in scope, not carrier-specific, route-specific, or traffic-type specific. The Commission expressly stated that "[t]hese new rules are narrowly tailored to address harmful practices while avoiding burdens on entities not engaging in access stimulation." *Order* at ¶33.

[42] *Order* at ¶672.

Commission is well aware, traffic imbalances on particular routes occur every day (such as when a help-desk with primarily inbound calls is located in an exchange), and traffic ratios change regularly (such as when customers switch carriers or new businesses are established). Many such imbalances favor price-cap LECs.

The petitions for reconsideration seeking to modify the standards triggering the rules[43] or to establish uniquely onerous complaint procedures add needless complexities and would misdirect Commission resources from more critical concerns while failing to address the targeted end-user traffic stimulation situation. Moreover, these procedures would adversely affect the competitive marketplace by forcing challenged carriers to waste time and money responding to complaints regardless of whether their tariffs are at benchmark levels or they engage in end-user traffic stimulation.

The complaint remedy already exists to address anomalous situations. It should not be modified to become a routine part of the intercarrier compensation regime.

[43] *See*, *e.g.*, MetroPCS Petition at 13-16. In a recent *ex parte* filing, MetroPCS described its requested "clarification" as designed to ensure that "a carrier cannot defeat the 3:1 test merely by offsetting a one-way business plan in one discrete line of business that generates high volumes of inbound traffic against a separate and distinct one-way business plan in a different discrete line of business that generates high volumes of outbound traffic only." *See* Letter from Carl Northrop, Telecommunications Law Professionals, to Marlene H. Dortch, Secretary, FCC at 2, WC Dkts. 10-90, *et al.*, (filed Jan. 27, 2012); *see also* MetroPCS Petition at 13. This is exactly the type of ICC micromanagement the Commission already rejected, and MetroPCS has offered no new evidence and has not demonstrated material error in the *Order*. The Commission's modification of its original proposal to incorporate the 3:1 traffic ratio and 100% growth thresholds demonstrates that it properly took note of record comments and carefully crafted a rule aimed at deterring "access stimulation" that would not be so broad as to restrict every situation in which there is revenue sharing, whether or not access stimulation is involved. HyperCube may have preferred an even more narrowly targeted rule, but recognizes that the Commission achieved a reasonable balancing of competing interests, including the need for a rule that would be administratively simple, could be promptly implemented, and would be virtually self-executing.

A. The "Access Stimulation" Criteria Should Not Be Made Route-Specific, Carrier-Specific, or Traffic-Type Specific.

MetroPCS asks the Commission to make the access stimulation triggers route-specific, carrier-specific, and/or traffic-type specific.[44] Carriers such as HyperCube, however, serve a national market, rather than the single markets typical of the end-user traffic stimulation situation. In this context, it would make no sense to analyze the carrier's traffic on a route-specific or carrier-specific basis. Similarly, there is no basis for making the computation traffic-type specific[45] and further expanding the range of potential complaints. The triggers in the new rules properly focus on overall traffic ratios and growth, and they cover the targeted end-user traffic stimulation situations where the Commission has found rate reductions appropriate.

To adopt the requested "clarification" would in effect establish a "heads I win, tails you lose" situation benefiting carriers that are able to leverage longstanding customer relationships over their newer or smaller competitors who do not have large existing customer bases. Under this approach, the non-revenue sharing carrier could with impunity amass a huge favorable traffic imbalance for a particular route or kind of traffic, or overall, often because it is vertically-integrated, but that carrier could complain to the Commission if the revenue-sharing carrier with whom it exchanged traffic exceeded a threshold for some narrow route or category of traffic.

[44] *See* MetroPCS Petition at 13-15. Making the thresholds narrower by making them route-, carrier-, and traffic type-specific would only serve to sweep into their ambit carriers not engaged end-user traffic stimulation. This would be contrary to the Commission's intent in trying to limit the access stimulation definition to avoid over-inclusiveness. *See Order at* ¶667.

[45] *See* MetroPCS Petition at 13-15. To the extent that MetroPCS is concerned with such situations as "Traffic Stimulators . . . buying multiple MetroPCS phones and using them in connection with auto-dialers to generate high volumes of calls to certain LECs with high termination rates," *id.* at 15, MetroPCS can avail itself of other remedies, such as the existing complaint process. MetroPCS cannot expect to receive special treatment, however, merely because it has elected to market its services on a flat rate basis.

Furthermore, there are unintended consequences in such arbitrary ratio tests. Intermediate providers and tandem operators have little ability to affect end-user calling patterns. However, because of the way intermediate products are purchased wholesale by originating and terminating providers, the use of an intermediate carrier for one-way distribution of traffic can immediately place the intermediate carrier above an arbitrary threshold when end-users change calling patterns on the end points of the connection. For example, the shift of a large-volume call center from one "balanced" carrier to another may cause one or both to exceed the threshold and thereby unbalance both intermediate carriers with regard to these types of measurements.

Nor should the Commission adopt Sprint's proposal to open a special inquiry any time when the traffic of a competitive carrier exceeds that of the benchmarked LEC,[46] regardless of whether there was "access stimulation." Adoption of Sprint's proposal would transform a narrowly-tailored rule change intended to address a limited problem into a back door to plenary Commission review on an individual basis of any access charges a carrier wishes to avoid, so long as revenue-sharing is used by the challenged carrier, and regardless of the overall traffic ratios that carrier may have with the complainant.

These proposals would not make the rules more effective in addressing the discrete issue resolved by the Commission, but they could give unfair commercial advantage to their proponents. MetroPCS and Sprint have neither shown fundamental errors in the *Order* nor offered any critical information or evidence they could not have provided earlier. They are not entitled to reconsideration merely because a different rule from that adopted by the Commission would better suit their individual circumstances or business plans.

[46] Sprint Petition at 9.

B. The Complaint Remedy Should Not Be Modified to Specially Address "Access Stimulation" with Uniquely Onerous Procedures But Rather Should Use Simplified Procedures to Achieve Prompt Dispute Resolution.

MetroPCS also asks the Commission to modify the complaint rules in access stimulation situations by setting forth special, particularly onerous rules to govern such proceedings.[47] Instead, the Commission should implement procedures that allow it to resolve any disputes quickly and efficiently, without imposing undue and anticompetitive burdens on challenged carriers merely because their use of revenue sharing marketing opens them to challenge.

1. Complaint Proceedings Should Be Foreclosed in Most Cases Where Tariffs Are at Benchmark Levels.

A showing that the challenged carrier's access charges are at or below the benchmark should almost always foreclose any further complaint raising a traffic imbalance question.[48] The Commission made a reasoned determination on a self-effectuating remedy[49] to address end-user traffic stimulation, and if the access charge is at or below the benchmark, that should be the end of it, absent unusual circumstances, such as claims of above-tariff billing. To hold otherwise would expose a carrier to harassment and unnecessary effort and expense merely because the carrier engaged in revenue sharing. As noted above, there are many reasons for traffic imbalances, but the only circumstance the Commission's rules are intended to address is access stimulation.

[47] *See* MetroPCS Petition at 13-15, 16 (urging that the test factors be applied on the basis of sub-categories of traffic and in relation to traffic exchanges with particular carriers, and that clear and convincing rebuttal evidence be required).

[48] HyperCube does not, of course, seek to deny the availability of the complaint remedy in other contexts, but any claims based solely on the existence of traffic imbalances should be summarily rejected if the tariffed rates are at or below the benchmark. A Commission ruling making this clear would, of course, forestall needless, wasteful resort to the complaint remedy.

[49] The Commission anticipates that under its new rules parties will be able to resolve their disputes in good faith "without further Commission intervention" and there will be fewer disputes and litigation about access stimulation. *Order* at ¶¶ 699, 700.

2. Expedited, Not Atypically Onerous, Procedures Should Govern Most Access Charge Proceedings.

The Commission should reject efforts to expand the benchmark tariff remedy by applying special, more onerous rules to govern the conduct of access charge complaint proceedings. The Commission already balanced competing interests in crafting an approach for deterrence of end-user traffic stimulation.

For example, MetroPCS asserts that a terminating LEC should be able to overcome a *prima facie* case of traffic imbalance only with clear and convincing evidence that the carrier-to-carrier data is not indicative of traffic stimulation.[50] The Supreme Court has held repeatedly, however, that such an evidentiary standard is required only in very unusual circumstances, such as those implicating important human rights.[51] A commercial access charge dispute hardly rises to this level, and there is no basis or precedent for establishing such an unusually high evidentiary standard in an access charge complaint proceeding before the Commission.

Rather, the Commission should *simplify* the rules governing most complaint proceedings in the access charge complaint context. As stated above, reference to the challenged carrier's tariff should be sufficient evidence of compliance to require immediate dismissal of the complaint where the rates are at or below the benchmark.

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[50] MetroPCS Petition at 16.

[51] The Supreme Court has recognized that a "standard of proof 'serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979). Proof via clear and convincing evidence is required "where particularly important individual interests or rights are at stake." *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982) (proceeding to terminate parental rights); *Addington v. Texas*, *supra* (involuntary commitment proceeding); *Woodby v. INS*, 385 U.S. 276, 285-286 (1966) (deportation). In contrast, "imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence." *See, e.g., United States v. Regan*, 232 U.S. 37, 48-49 (1914). In interpreting an SEC case, for example, the Supreme Court thus determined that a preponderance standard for an administrative proceeding concerning alleged violations of the antifraud provisions was appropriate. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). A preponderance of the evidence standard allows both parties to share the risk of error equally, and any other standard expresses a preference for one side's interest. *Id.*

In the event rates are not at the benchmark, HyperCube recognizes that a particular complaining carrier would have information only about its own traffic exchanges with another carrier. If a complaint is filed alleging a triggering imbalance and providing supporting documentation, however, it should be sufficient for the challenged carrier to rebut that evidence by providing confidential information[52] to the Commission staff showing that the carrier's national traffic exchanges do not reflect such an imbalance,[53] or that the carrier did not engage in end-user traffic stimulation.[54] The challenged carrier should have no greater evidentiary burden than the complainant. Any complaint should be dismissed promptly upon receipt of such rebuttal evidence with a simple notice to the parties to that effect. Otherwise, the Commission's proceedings could be perverted into vehicles for harassment of market competitors and other anticompetitive conduct.

V. The Relationships Between Originating/Terminating Services Providers and Their End-User Customers are Irrelevant to the Interstate Access Services Provided by Intermediate Carriers, and the Commission Should Expressly So Rule.

Sprint seeks clarification as to whether there is in fact an end-user telecommunications service involved in certain interstate access situations.[55] In this context, HyperCube respectfully requests that the Commission clarify that such issues, however resolved, are irrelevant with

[52] A carrier should be entitled to submit such rebuttal evidence in confidence so that the complaint process cannot be transformed into a fishing expedition used by competitors to obtain confidential business information. The complainant would not need the same protection, at least *vis-à-vis* the challenged carrier, because the complaint would be based on their mutually-exchanged traffic.

[53] *See Order* at ¶699 (requiring traffic data as rebuttal evidence).

[54] HyperCube agrees with MetroPCS that the rule states that a single carrier's *prima facie* case may be rebutted by a showing that its overall traffic does not satisfy the thresholds. *See* MetroPCS Petition at 15, n.40. The tests were added specifically to ensure that the rule was not overbroad, and there is no ambiguity in the language of the rule, which requires no clarification.

[55] *See* Sprint Petition at 4 (asserting "if an entity does not qualify as an end-user under terms of the LEC's access tariff, calls generated by that entity and terminated by the LEC in question do not constitute access services, and access charges do not apply.").

respect to the payment obligations of a carrier such as Sprint that avails itself of the interstate access services of an intermediate carrier.

Intermediate carriers such as HyperCube provide access to the networks of originating and terminating carriers and service providers (collectively, "Providers") for the purpose of allowing IXCs and other carriers (for convenience, collectively, "IXCs") to originate and terminate calls to end-users served by the Providers. The intermediate carrier has no control over the relationship between a Provider and its customers or over the means by which calls are originated by or terminated to such end-user customers.

Where IXCs are the customers for an intermediate carrier's telecommunications service offered for a fee to a segment of the public – interstate access – they are obligated to pay for that service regardless of the relationship between a Provider and its end-user customers. An IXC offers its own end-user customers a service providing for ubiquitous origination and termination of calls to and from other end-users. The IXC is obligated under the Communications Act to interconnect with other carriers for the purposes of such call completion. The IXC may interconnect directly or indirectly with other carriers, including intermediate carriers, for call completion, but an IXC does not have the option generally to block calls to carriers whose services it utilizes pursuant to constructive ordering under a tariff.[56] Nor does an IXC have the option to refuse to pay for use of such services.

The relationship between a Provider and its end-user customers is irrelevant to the relationship between the IXC and the intermediate carrier whose role is to switch a call to or from the Provider's network. Therefore, Sprint's arguments about whether a particular Provider may be offering its end-users a telecommunications service can have no bearing on Sprint's

[56] HyperCube is not, of course, addressing such call blocking situations as when customers affirmatively request blocking of harassing calls from specific telephone numbers.

obligations to pay for intermediate carrier interstate access services Sprint uses. Hypercube therefore respectfully requests that, to avoid misunderstanding, the Commission so rule.

VI. The Commission's Call Signaling Rules Are Consistent with Industry Standards and Should Not Be Delayed or Relaxed.

In formulating its modified call signaling rules, the Commission acted in accordance with industry standards[57] in requiring an intermediate carrier to pass downstream data received from upstream carriers,[58] and in imposing no liability on the intermediate carrier for inaccuracies in the data provided by an upstream carrier.[59] The Commission also reasonably accommodated competing interests by requiring transmission of the calling party and charge number data, but not transmission of other parameters as recommended by HyperCube and others. If the Commission is serious about eliminating phantom traffic, the FCC should not relax or delay implementation of these limited rules, and the Commission should not waive them absent a specific showing of true infeasibility.

A. Imposing Liability on Intermediate Carriers Would Be Inconsistent with Industry Standards and Would Deter Intermediate Carriers from Supplementing Message Information.

NECA has asked the Commission to reconsider its decision not to impose financial liability on intermediate providers for incorrect call data.[60] NECA's request is supported only by the bare assertion that the Commission insufficiently expanded call signaling rules, with the

[57] Selected pages from the ATIS-300011 document concerning population of the Jurisdictional Information Parameter ("JIP") were placed in the record of this Proceeding with the kind permission of the Alliance for Telecommunications Industry Solutions. *See* Letter from Helen E. Disenhaus, Lampert, O'Connor & Johnston, P.C., to Marlene H. Dortch, Secretary, FCC, WC Dkts. 10-90, *et al.*, (filed Sept. 27, 2011). Industry standards as described in ATIS-300011 do encourage intermediate carriers to use available information to supplement, and thus improve, the information included in signaling and billing information.

[58] *See Order*, Appendix A at 565 (§ 64.1601(a)(2)).

[59] *See Order*, Appendix A at 565 (§ 64.1601).

[60] NECA Petition at 38.

result that there will still be inadequately identified traffic. There is nothing new in NECA's arguments.

HyperCube too had requested that the Commission require population of additional data fields,[61] consistent with industry standards that encourage carriers to use available information to supplement, and thus improve, the information included in signaling and billing information.[62] These standards recognize, however, that without coordination between carrier networks, and lacking omniscience, carriers are restricted in their ability to correctly populate message fields if they receive incomplete or inaccurate information from originating service providers. Industry standards thus do not make carriers liable for errors in the data they receive and pass on. Such protection from liability is at least equally necessary under the Commission's new call signaling rules, which require carriers to pass on *unaltered* the mandatory information they receive.[63]

The Commission's rules thus properly acknowledge the limitations on the role of intermediate carriers by not imposing on intermediate providers liability for inaccuracies in data transmitted as received from originating providers.[64] If intermediate providers were instead made liable for any errors in the data passed on to terminating carriers, as requested in the NECA

[61] *See, e.g.*, Comments of HyperCube Telecom, LLC at 13, 21, WC Dkts. 10-90, *et al.*, (filed Apr, 1, 2011) ("HyperCube Comments"); Reply Comments of HyperCube, LLC at 9, WC Dkts. 10-90, *et al.*, (filed Apr. 18, 2011) ("HyperCube Reply Comments").

[62] HyperCube routinely does so for its trading partners, including providing the JIP and charge number ("CN") where the underlying partner is unable to directly pass these parameters.

[63] *See Order*, Appendix A at 565 (§ 64.1601(a)(2)).

[64] *Order* at ¶732 ("Proposals to impose upstream liability or financial responsibility on carriers threaten to unfairly burden tandem transit and other intermediate providers with investigative obligations. . . . The phantom traffic rules . . . are not intended to ensnare providers that happen to receive incomplete signaling information.").

Petition,[65] intermediate carriers would be reluctant to supplement the record information they receive in any way.

Only the originating provider has complete information, and only the originating provider should be liable for errors. Imposing liability on intermediate providers would only worsen the phantom traffic problem by eliminating their positive role in making reasonable efforts to pass on more complete information to terminating carriers. NECA provides no previously unavailable information or arguments or showing of material error, and the decision not to impose liability on intermediate providers should not be reconsidered.

B. Delay of the Modified Call Signaling Rules and Grant of Unsupported Waiver Requests Would Frustrate Efforts to Reduce Phantom Traffic.

The very large carriers now seeking delay of the effective date of the call signaling rules or seeking blanket rule waivers previously supported adoption of rules to address phantom traffic.[66] As the Commission recognized in the *Order*,[67] if the Commission wants the rules to be effective, the Commission should not delay or waive them without specific evidence of infeasibility in particular situations.[68] If the Commission adds a blanket waiver or exception provision, or grants waivers on the basis of generalized, unsupported claims of infeasibility, then the phantom traffic problem will persist.

The Commission thus properly did not include a broad, generalized waiver provision in the rules themselves, although it expressly noted the availability of the individual waiver remedy in the *Order*. In declining to impose additional call signaling rules that would ensure the

[65] NECA Petition at 38-39.

[66] CenturyLink, Inc. Petition for Limited Waiver at 1-2, WC Dkts. 10-90, *et al.*, (filed Jan. 23, 2012) ("CenturyLink Waiver"). *See also Order* at ¶709 and n.1200 (noting USTelecom's report of increased phantom traffic).

[67] *Order* at ¶723 ("exceptions would have the potential to undermine the rules").

[68] 47 C.F.R. § 1.3; *Order* at ¶723 (noting the availability of waivers).

accuracy of traffic identification, as requested by HyperCube and others, the Commission already compromised between the competing needs of carriers that would benefit by the highest quality data and the needs of those opposing data improvement for their own financial reasons.

The Commission should not now weaken the rules on reconsideration by adding a blanket waiver provision or exception. There are multiple options in the marketplace through which carriers can provide the data without the necessity for making substantial capital investments in legacy equipment.[69] That Verizon's Petition cites only information already in the record further demonstrates that Verizon has offered no basis for broad waiver or delay that has not already been rejected by the Commission.

Verizon would apparently prefer to have the mere claim of "infeasibility" (whether due to actual technical problems or mere practical constraints) be sufficient to warrant a waiver.[70] Although technical limitations may exist, the practical aspect is that there are many ways to solve this problem today, including the use of other facilities to correctly populate the data fields. Moreover, digit and field manipulation is commonplace in CLASS data fields, and even more common in the case of VoIP traffic switching. In the current signaling environment, where E911

[69] Options for those carriers who may have technical issues that would be expensive, but not infeasible, to remedy include intermediate carrier solutions allowing population of missing data fields by reference to agreed-upon use of parameters such as the Originating Line Information ("OLI"). These services, such as data population to correct or augment where signaling is insufficient, are often contract-based. By using these third-party services, a carrier with legacy technology does not itself have to take on the tasks of inserting JIP (as per ATIS-30011), OLI, or CN; mapping trunks or end offices to data; or providing database queries.

[70] The Verizon Petition apparently seeks a broad waiver of the rules even in cases where there may be "practical constraints" – whatever those may be – that do not amount to technical infeasibility. Verizon Petition at 3. Some situations for which Verizon apparently seeks a waiver are those in which "carriers have never before had arrangements to populate these fields because the data are not needed," *id.* at 9, which is not the same as saying those fields *cannot* be populated. Similarly, the waiver petitions filed in this proceeding do not provide any technical evidence of infeasibility or identification of the locations and switches where compliance is not possible. *See generally* Petition for Limited Waiver of AT&T Inc. at 1, WC Dkts. 10-90, *et al.*, (Dec. 29, 2011) (requesting a waiver where "compliance with the new rules is technically infeasible using currently deployed equipment and while AT&T investigates") ("AT&T Waiver").

compliance obligations have led to more precision in signaling capability,[71] there should be few situations in which it is in fact infeasible for most carriers to provide accurate information.

It is no secret in the industry that carriers' advocacy of factoring is often based not on actual infeasibility but on the financial benefits carriers derive from factoring, because the factoring procedure favorably distorts their traffic type ratios. The rules do no more than require carriers to accurately categorize their own traffic and pass that information to terminating carriers. That this very reasonable obligation may have an adverse financial impact on a carrier hardly justifies a waiver or delay of the rules' effective date.

In the rare case where compliance is technically infeasible, the Commission should require that waiver requests provide specific, detailed information sufficient for the Commission to assess the necessity for the waiver. At a minimum, carriers seeking waivers of the data population obligations should be required to specify the particular network switches involved and the reason for the infeasibility. Thus, a carrier requesting a waiver should be required to state the Common Language Location Identifier ("CLLI") code of the office which is impaired, the reason for the impairment, and the length of expected impairment. This is necessary so that other carriers can handle codes from that office through an exception process. Carriers seeking waivers should also be required to notify the industry generally of the problem cases.

[71] HyperCube Comments at 17 and n.42, 17-20; HyperCube Reply Comments at 8-14. The Verizon Petition, moreover, is not limited to situations of actual technical impossibility. Verizon complains generally of "situations in which originating carriers or intermediate providers simply cannot pass calling party number and/or charge number in the call signaling stream because it is not technically possible to do so *or* network equipment was not designed with this functionality based on industry standards in place at the time." Verizon Petition at 9 (emphasis added). This may mean that there are situations in which older equipment now has this functionality, whether or not it had it when the equipment was designed, but Verizon does not want to use it. Apparently Verizon's view is that because large traffic volumes are at issue, and because Verizon has "never before had arrangements to populate these fields because the data are not needed," there is no reason for it to populate the fields even if it can do so, merely to avoid sending "phantom" traffic. *Id.*

HyperCube can conditionally support the NECA proposal as a default approach in those limited situations in which compliance with the rules really is infeasible for technical reasons. NECA has proposed that, absent mutual agreement on factors or the provision of information that can be used to determine with reasonable accuracy the actual origination point of a call, terminating carriers may use as a default the originating and terminating telephone numbers associated with a call to determine jurisdiction for billing.[72]

HyperCube's support for this proposal is conditioned, however, on the proviso that these numbers are accurately populated in signaling and that the carriers are required to maintain proper Local Exchange Routing Guide ("LERG") documentation. This requires that carriers be responsible for so updating the LERG database in a timely fashion.

To the extent that carriers are permitted to continue to use factoring, the accuracy of the factoring estimates should be improved by requiring that they be supplemented by audits or augmented by signaling.[73] The current industry guidance of population of the JIP field by the first switch that can do it, as provided in ATIS 300011, No. 5, while admittedly imperfect in some edge conditions, is a far better option than simple factoring.

CONCLUSION

The Commission should dismiss the reconsideration and clarifications requested in the Petitions and opposed here for their failure to satisfy the applicable standards for grant of reconsideration and/or clarification. The Commission should, however, clarify the *Order* and its implementation procedures as recommended here to the extent the Commission re-examines any

[72] NECA Petition at 38.

[73] There are multiple product solutions in the marketplace. For example, TEOCO and others offer software and solutions to perform such reconciliations. These work by examining call and signaling records to validate and perform the necessary work to supplement billing records, or to reconcile other carriers' billing with traffic.

of the issues raised by the Petitions, particularly with respect to demands for narrowing the traffic imbalance thresholds and delaying full implementation of the modified call signaling rules.

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